Kong Long Huat Chemicals Sdn Bhd v Raylee Industries Sdn Bhd

HIGH COURT (JOHOR BAHRU) — COMPANIES WINDING-UP PETITION NO 28–34 OF 1998
ABDUL MALIK ISHAK J
2 JUNE 1998

Companies and Corporations — *Winding up — Petition under s 218 — Filing of — Petition filed before expiry of 21 days as specified in notice pursuant to s 218 — Whether petition was premature — Whether premature petition was void ab initio — Companies Act 1965 s 218*

Companies and Corporations — *Winding up — Liquidators — Appointment of liquidator following premature presentation of winding-up petition — Whether application for appointment of liquidator would similarly be premature — Whether order for appointment of liquidator was tainted with illegality — Failure of petitioner to make full and frank disclosure — Whether court should set aside order*

Companies and Corporations — *Winding up — Liquidators — Application to set aside order appointing provisional liquidator — Whether receiver and manager's entitlement to custody and control of company is superior to a liquidator's statutory right and duty to take the company's property into his custody and control — Whether application ought to be allowed*

One Kenneth Teh Ah Kiam ('the receiver and manager') was appointed receiver and manager of the respondent. Subsequently, the petitioner obtained orders of the court ('the order') appointing a provisional liquidator ('the provisional liquidator') for the company. The receiver and manager then applied for the order or the execution thereof be stayed. It was avered that the winding-up petition ('the petition') was filed on 15 April 1998 which was before the expiry of 21 days as specified in the notice dated 1 April 1998 filed pursuant to s 218 of the Companies Act 1965.

Held:

(1) The petition was presented eight days too soon and therefore, was void ab initio. Furthermore, when the petition was presented, there had been no neglect on the part of the respondent to pay the debt (see p 339B–C); *Re Lympne Investments Ltd* [1972] 2 All ER 385 followed.

(2) The petitioner could only apply to appoint a provisional liquidator after the presentation of a valid winding-up petition. Since the petitioner here had prematurely presented the petition, any application for the appointment of a provisional liquidator would similarly be premature. This meant that the order for the appointment of a provisional liquidator was tainted with illegality (see p 339D–E).

(3) The failure of the petitioner to make a full and frank disclosure of all relevant facts in their ex parte application to appoint the provisional liquidator would empower the court, without hesitation, to set aside the order (see p 343G–H).

(4) To direct the provisional liquidator to take possession of all the real and personal estate of the company would have been to ignore the principle that the receiver's entitlement to custody and control is superior to a liquidator's statutory right and duty to take the company's property into his custody and control. Furthermore, in this case, the need to protect the company's assets by the appointment of a provisional liquidator had not been shown (see p 345D–F); *Re AH Hodge & Sons Ltd* [1984] 2 ACLC 707 followed.

Obiter:

A receiver and a manager is entitled in law to not only possession of all the physical assets of the company but also entitled to all choses in action, such as the benefit of contracts with the company existing at the date of the winding-up. If circumstances demand, the receiver and manager may enforce these rights by suing in the name of the company (see p 343C–D).

[Bahasa Malaysia summary

Seorang bernama Kenneth Teh Ah Kiam ('penerima dan pengurus') telah dilantik sebagai penerima dan pengurus penentang. Berikutnya, pempetisyen telah memperolehi perintah-perintah mahkamah ('perintah tersebut') yang melantik seorang penyelesai sementara ('penyelesai sementara tersebut') untuk syarikat tersebut. Penerima dan pengurus kemudiannya memohon supaya perintah tersebut atau pelaksanaannya digantung. Adalah ditegaskan bahawa petisyen penggulunggan ('petisyen tersebut') difailkan pada 15 April 1998 yang merupakan tempoh sebelum tamat tempoh 21 hari seperti yang ditetapkan dalam notis bertarikh 1 April 1998 yang difailkan menurut s 218 Akta Syarikat 1965.

Diputuskan:

(1) Petisyen tersebut telah dikemukakan lapan hari sebelum tempohnya dan maka, adalah tak sah ab initio. Tambahan pula, apabila petisyen tersebut dikemukakan, tidak terdapat kecuaian pada pihak penentang untuk membayar hutang (lihat ms 339B–C); *Re Lympne Investments Ltd* [1972] 2 All ER 385 diikut.

(2) Pempetisyen cuma boleh memohon untuk melantik seorang penyelesai sementara setelah pengemukaan suatu petisyen penggulungan yang sah. Oleh kerana pengemukaan petisyen

tersebut oleh pempetisyen di sini adalah pramasa, sebarang permohonan untuk perlantikan seorang penyelesai sementara juga adalah pramasa. Ini bermakna bahawa perintah untuk perlantikan seorang penyelesai sementara dicemari oleh kepenyalahan (lihat ms 339D–E).

(3) Kegagalan pempetisyen untuk membuat penzahiran yang penuh dan terbuka atas segala fakta yang relevan dalam permohonan ex parte mereka untuk melantik penyelesai sementara akan memberi kuasa kepada mahkamah, tanpa teragak-agak, untuk mengetepikan perintah tersebut (lihat ms 343G-H).

(4) Untuk mengarah penyelesai sementara supaya merampas kesemua harta sebenar dan persendirian syarikat tersebut adalah bagaikan mengabaikan prinsip bahawa hak penerima kepada jagaan dan kawalan mengatasi hak dan kewajipan berkanun penyelesai untuk meletak harta syarikat tersebut di bawah jagaan dan kawalannya. Tambahan pula, dalam kes ini, keperluan untuk melindungi aset syarikat tersebut menerusi perlantikan seorang penyelesai sementara tidak ditunjukkan (lihat ms 345D–F); *Re AH Hodge & Sons Ltd* [1984] 2 ACLC 707 diikut.

Obiter:

Seorang penerima dan seorang pengurus berhak di sisi undang-undang bukan sahaja untuk milikan kesemua aset fizikal syarikat tersebut tetapi juga berhak kepada segala hak dalam tindakan, seperti faedah kontrak-kontrak dengan syarikat tersebut yang wujud pada tarikh penggulungan. Andainya diperlukan oleh keadaan, penerima dan pengurus boleh menguatkuasa hak-hak ini dengan mendakwa atas nama syarikat tersebut (lihat ms 343C–D).]

Notes

For cases on petition under s 218, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 846–848.

For cases on liquidators, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 745–766.

Cases referred to

Adam Eyton Ltd, Re; ex p Charlesworth (1887) 36 Ch D 299 (refd)
AH Hodge & Sons Ltd, Re [1984] 2 ACLC 707 (folld)
Carapark Industries Pty Ltd, Re [1967] 1 NSWR 337 (refd)
Charterland Goldfields Ltd, Re (1909) 26 TLR 132 (refd)
Chateau Hotels Ltd, Re [1977] 1 NZLR 381 (refd)
Chua Boon Chin v JM McCormick & Ors [1979] 2 MLJ 156 (refd)
Cornhill Insurance Plc v Improvement Services Ltd & Ors [1986] 1 WLR 114 (refd)
Dry Docks Corp of London, Re (1888) 39 Ch D 306 (refd)

Gosling v Gaskell and Grocott [1897] AC 575 (refd)
Gough's Garages Ltd v Pugsley [1930] 1 KB 615 (refd)
High Crest Motors Pty Ltd, Re [1978] 3 ACLR 564 (refd)
Highfield Commodities Ltd [1985] 1 WLR 149 (refd)
International Properties Pty Ltd, Re [1977] 2 ACLR 488 (refd)
Jeans West (Distribution) Pty Ltd, Re (1990) 4 ACSR 470; 9 ACLC 592; 5 WAR 31 (refd)
JL Young Manufacturing Co Ltd, Re [1900] 2 Ch 753 (refd)
Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors [1993] 3 MLJ 303 (refd)
Levy v Napier (1962) SC 468 (refd)
Lumley v Osborne [1901] 1 KB 532 (refd)
Lympne Investments Ltd, Re [1972] 2 All ER 385 (folld)
Mercantile Credits Ltd v Atkins [1985] 3 ACLC 485 (refd)
Qintex Ltd (No 3), Re (1990) 2 ACSR 627 (refd)
PacAsian Services Pte Ltd v European Asian Bank AG [1989] 3 MLJ 385 (refd)
Robert Bryce & Co Ltd v Chicken & Food Distributors Ltd [1991] MCLR 133 (refd)
Sir John Moore Gold Mining Co (1879) 12 Ch D 325 (refd)
South Downs Packers Pty Ltd v Beaver [1984] 8 ACLR 990 (refd)
Sowman & Ors v David Samuel Trust Ltd (in liquidation) [1978] 1 WLR 22 (refd)
Thomas v Todd [1926] 2 KB 511 (refd)
Visbord v Federal Commissioner of Taxation (1943) 68 CLR 354 (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 rr 7(2), 35(1), 193
Companies Act 1965 ss 108, 218, (2)(a), 223(a), 231, 266
Companies Act 1955 [NZ] s 234(1)
Courts of Judicature Act 1964 s 25(2), Sch para (6)

Ong Ban Chai (*KP Ng* with him) (*Ong Ban Chai & Co*) for the petitioner.
Wong Kian Kheong (*Huang Min-Mei* with him) (*Lee & Hishamuddin*) for the respondent.

Abdul Malik Ishak J: This was an application by way of summons-in-chambers in encl 10, by the receiver and manager for the respondent for the following orders:

(1) pursuant to r 193 of the Companies (Winding-Up) Rules 1972, the honourable court hereby abridge the time appointed and/or fixed by r 7(2) of the Companies (Winding-Up) Rules 1972 for the filing and/or service of any document or otherwise and/or taking any proceeding in this application; and

(2) (a) pursuant to ss 231 and 266 of the Companies Act 1965, the order appointing Teoh Cheng Hua as the provisional liquidator of the respondent be set aside;

(b) pursuant to ss 231 and 266 of the Companies Act 1965, the said Teoh Cheng Hua be removed from his office as provisional liquidator of the respondent;

(c) costs;

(d) an enquiry as to damages resulting from the appointment of Teoh Cheng Hua as the provisional liquidator of the respondent; and

(e) such further and other relief which this honourable court deems fit.

or, in the alternative:

(3) (a) pursuant to s 25(2) read with para 6 of the Schedule to the Courts of Judicature Act 1964, the execution of and/or all further proceedings in relation to the order appointing Teoh Cheng Hua as the provisional liquidator of the respondent be stayed until further order by this honourable court;

(b) costs; and

(c) such further and other relief which this honourable court deems fit.

Kenneth Teh Ah Kiam ('Kenneth Teh'), a senior partner of Messrs Price Waterhouse and a duly appointed receiver and manager of the abovenamed respondent by Bank Bumiputra Malaysia Bhd ('BBMB') on 9 April 1998 under the powers contained in the debentures dated respectively 19 July 1988, 25 September 1989, 1 August 1991, 10 January 1994 and 30 April 1996 which were executed in favour of BBMB by the respondent, affirmed an affidavit on 29 August 1998 as seen in encl 9 in support of encl 10. In encl 9, Kenneth Teh deposed that the application in encl 10 was to, inter alia:

(a) stay the order of this court in appointing a provisional liquidator over the respondent; and

(b) set aside the appointment of the provisional liquidator over the respondent.

It is germane to point out that since a receiver and manager has been appointed by BBMB for the respondent, a provisional liquidator will not be appointed by the court unless there is evidence to show that the receiver and manager are dissipating the assets: *Re AH Hodge & Sons Ltd* [1984] 2 ACLC 707. Was there evidence here that the receiver and manager had dissipated the assets?

There are numerous instances where liquidators, which must necessarily include provisional liquidators, have been removed. The following instances may not be exhaustive but they certainly serve as useful guidelines:

(1) To paraphrase Jessel MR in *Sir John Moore Gold Mining Co* (1879) 12 Ch D 325 at p 331 where there was some unfitness of the person by reason of that person's personal character, or from that person's connection with other parties or from the circumstances in which

A that person was involved, then the court would remove that person as a liquidator.

(2) When a liquidator refuses to take action against recalcitrant directors because the liquidator himself is a miscreant or the directors are his friends, then the liquidator may be removed by the court: *Chua Boon Chin v JM McCormick & Ors* [1979] 2 MLJ 156.

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(3) A bias liquidator who has connection with persons against whom there might be pending claims, would be removed by the court (*Re Charterland Goldfields Ltd* (1909) 26 TLR 132).

(4) Where a liquidator's duty conflict with his interest, his removal would be imminent (*Re International Properties Pty Ltd* [1977] 2 ACLR 488 at p 492)

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(5) If it is in the interest of liquidation that the liquidator has to be removed, then the liquidator would be removed: *Chua Boon Chin v McCormick* and *Re Adam Eyton Ltd, ex p Charlesworth* (1887) 36 Ch D 299 at pp 303–304.

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It appears that Kenneth Teh deposed the affidavit in encl 9 based on his personal knowledge as a receiver and manager or based on the records, papers and documents of the respondent and BBMB to which he has custody and access thereof. I must at once give credit to the person who prepares encl 9 because it adverted to the source of the information and belief of the deponent, a requirement in the Rules of the High Court 1980 ('the RHC') and by the authorities like *Re JL Young Manufacturing Co Ltd* [1900] 2 Ch 753 (CA); and *Lumley v Osborne* [1901] 1 KB 532. From the affidavit of Kenneth Teh, the following facts unfolded.

E

At the request of the respondent, BBMB granted various credit facilities to the respondent. Debentures were executed by the respondent in favour of BBMB to secure the repayment of the sums due and owing by the respondent to BBMB under certain credit facilities. The material terms of the debentures were, inter alia, that all monies, interest, and costs payable from time to time to BBMB would be secured by way of fixed and floating charges over all the assets of the respondent. A statement containing the particulars of the fixed and floating charges created by the respondent in favour of BBMB was lodged with the office of the Registrar of Companies ('ROC') for the purpose of registration of the said charges pursuant to s 108 of the Companies Act 1965. Somehow the respondent failed to repay the credit facilities to BBMB. Through its solicitors, BBMB sent a letter dated 27 March 1998 demanding, among others, repayment by the respondent to BBMB of the sum of RM50,361,607.11. The respondent failed to pay the said sum or any part thereof to BBMB. On 9 April 1998 because of the respondent's failure to repay the said sum, BBMB exercised its right under the debentures to appoint the receiver and manager over the respondent by way of a notice of appointment. In due course, the receiver and manager entered and took possession of the business premises of the respondent on 9 April 1998 — one at No 167, Jalan Glasiar, Taman Tasek, 80200 Johor Bahru and the other at No 26A, Jalan Lambak, Taman Johor, 81200 Tampoi, Johor Bahru.

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By way of an ex parte summons-in-chambers in encl 5, Mr Ong Ban Chai for the petitioner successfully obtained the following orders from this court on 22 April 1998:

(a) Mr Teoh Cheng Hua of M/s CH Teoh & Co an approved liquidator be appointed as provisional liquidator of the respondent company;

(b) the provisional liquidator do take possession, control and protect the assets or realize the assets of the respondent company and such assets are not to be distributed or parted with until further order; and

(c) the costs of this application be taxed and paid to the petitioner out of the assets of the respondent company.

It was deposed that the appointment of a provisional liquidator by this court over the respondent was made pursuant to s 231 of the Companies Act 1965. Enclosure 5 was supported by an affidavit of Voon Hon Kong, the Area Manager of the petitioner, who affirmed the affidavit on 15 April 1998 as seen in encl 4. Annexed to encl 4 was a notice under s 218 of the Companies Act 1965 marked as exh 'VHK 2' and that notice was worded thus:

NOTICE

PURSUANT TO SECTION 218 OF THE COMPANIES ACT 1965

To: Raylee Industires Sdn Bhd
No 167, Jalan Glasiar,
Taman Tasek,
80200 Johor Bahru. By hand

RE: Outstanding sum of RM122,235
Together with appropriate interest
and costs due to Kong Long Huat
Chemicals Sdn Bhd

TAKE NOTICE that you are required to pay us as solicitors for Kong Long Huat Chemicals Sdn Bhd of Lot 17, Jalan Perusahaan Empat, 68100 Batu Caves, Selangor, for the sum of Ringgit Malaysia One Hundred Twenty Two Thousand Two Hundred & Thirty Five (RM122,235) only being balance of goods sold and delivered together with interest thereon at the rate of 8% pa from 10 February 1998 to the date of realization and costs within TWENTY-ONE (21) DAYS from the service of this NOTICE, failing which you will be deemed to be unable to pay the aforesaid debt and appropriate action will be taken for the winding-up of Raylee Industries Sdn Bhd. Enclosed herewith a photocopy of the statement of accounts dated 28 February 1998 for your attention.

Dated 1 April 1998.

Sgd (Illegible)

M/s Ong Ban Chai & Co
Solicitors for Kong Long Huat
Chemicals Sdn Bhd,
of Suite Nos. 704-707, 7th Floor, Johor Tower
Jalan Gereja, 80100 Johor Bahru.
[File No OBC/W/D110/98]

Tel: 07-2245808 Fax: 07-2245800

Encl/cc
Kong Long Huat Chemicals Sdn Bhd,
Lot 17, Jalan Perusahaan Empat,
68100 Batu Caves, Selangor.

A perusal of the s 218 notice shows the following alarming set of facts:

(a) The notice was dated 1 April 1998 and the petitioner could only present a petition to wind up the respondent after 21 days from the day of service of the said notice on the respondent. There was no proof of service of the notice on the respondent except the averment in para 4 of the affidavit in encl 4 to the effect that the notice was served on 2 April 1998. It was deposed that there should be strict proof of service of the notice on the respondent as required by law and consequently that mere averment in para 4 of encl 4 was not sufficient proof of service of the notice on the respondent.

(b) Now, even assuming that the petitioner had been served with the notice on the respondent on 2 April 1998, which the receiver and manager denied, the earlies date for the petitioner to present the petition to wind up the respondent was on 23 April 1998. Here, the petitioner had presented the winding-up petition on 15 April 1998 which was before the expiry of 21 days as specified in the notice and as required by law. Accordingly, the petition had been presented by the petitioner prematurely and it was void ab initio. This was my judgment and I so hold accordingly. A similar factual scenario can be seen in the case of *Re Lympne Investments Ltd* [1972] 2 All ER 385 where the facts may be stated as follows. On 4 November 1971, the petitioner served a demand on the company for the repayment of a debt of £3,500. The debt was not repaid and on 25 November at 12.05 pm, the petitioner presented a petition for the compulsory winding-up of the company on the ground that the company was unable to pay its debts. The company contended that, at the time when the petition was presented, it had not neglected to pay the sum in question for a period of three weeks after it was demanded, as required by s 223(a) of the Companies Act 1948. The company further denied the existence of the debt and contended that the sum in question was a payment to it by the petitioner for shares in another company which the company was to hold in trust for him. The court held that the petition should be dismissed for the following reasons:

(1) Because it had been presented one day too soon. The period of three weeks from the service of the demand required by s 223(a) of the Companies Act 1948 had not expired, for in the computation of periods of time, unless there was an indication to the contrary, fractions of a day should be ignored and the day on which the initial event occurred was to be excluded.

(2) There was a substantial dispute as to the existence of the debt.

(3) It would be wrong to stand over the petition in order that the disputed issues might be resolved in other proceedings.

(4) When a debt was disputed on substantial grounds, the petitioner was not a creditor within the meaning of s 224(1) of the Companies Act 1948 and had no locus standi to present a petition even if the company was insolvent.)

(5) The existence of a dispute on substantial grounds as to the existence of a debt defeated the contention that the company had neglected to pay the debt within the meaning of s 223(a) of the Companies Act 1948.

In regard to the first reason for dismissal of the petition, Megarry J had this to say in *Re Lympne Investments Ltd* at pp 387–388 of the report:

> ... In other worlds, the petitioner presented his petition one day too soon. I propose to deal with this last point first. Section 223 of the Companies Act 1948 begins as follows:
>
> > 'A company shall be deemed to be to be unable to pay its debts — (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty pounds then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.'
>
> I do not think I need to read any more. As a matter of construction, the words 'has for three weeks thereafter neglected' seem to me to mean that it must be possible to point to a period of three weeks during which the neglect has continued. There can be no neglect to pay a sum demanded until the demand has been made, and this demand was served at some unascertained time during 4 November 1971. The general rule in the computation of periods of time is that unless there is sufficient indication to the contrary, fractions of a day should be ignored, at all events when the period is expressed in days or longer units and not in hours or shorter units, and that the day on which the initial event occurs is to be excluded: see generally *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 All ER 900, [1967] 2 QB 899. The fifth November was thus the first complete day, and 25 November was thus the twenty-first day. At the moment when the petition was presented, just after noon on 25 November, the petitioner could then at best point to a period of 20 days and a fraction of another day during which Lympne had 'neglected' to pay the money; and 20 days and a fraction is not the three weeks required by s 223(a). In other words, if on the afternoon of 25 November Lympne had paid the money, Lympne would have done so within the period of time specified in s 223(a).
>
> Despite counsel for the petitioner's persuasions, I can see no ground in this case for excluding the normal rule for the computation of time. Indeed, since the case is one in which Lympne had to do some act within the specified period if the consequences of the statute were to be avoided, the period should, in case of doubt, be construed long rather than short. This is in accordance with the views expressed in the Court of Appeal in the bankruptcy case of *Re North, ex p Hasluck* [1895] 2 QB 264, 64 LJQB 694, 59 JP 724; sub nom *Re North, ex p Parkinson* 72 LT 854, 45 Digest (Repl) 252, 197, namely, that of construing the provision so as to give as much or as little time as possible, depending on which is for the benefit of the person who has to do the act, and in this way to reduce the prospect of penal

consequences: see also *Re Figgis (decd), Re Roberts v MacLaren* [1968] 1 All ER 999, [1969] 1 Ch 123, [1968] 2 WLR 1173, Digest (Cont Vol C) 432, 1110a. Accordingly, in my judgment when the petition was presented there had been no neglect for three weeks to pay the sum demanded within the meaning of s 223(a), and therefore Lympne is not for this reason to be deemed to be unable to pay its debts. I should add that it was not contended that the completion of the period of three weeks long before the hearing of the petition had any relevance.

Applying *Re Lympne Investments Ltd*, the winding-up petition was presented eight days too soon and when the petition was presented there had been no neglect on the part of the respondent to pay the debt. In my judgment, under s 218(2)(a) of the Companies Act 1965 if a debtor does not pay within three weeks (21 days) of service of a notice, the creditor is entitled to present a petition and that creditor cannot be restrained by an injunction. At this stage, the debtor cannot say that it is able to pay but chooses not to: *Cornhill Insurance Plc v Improvement Services Ltd & Ors* [1986] 1 WLR 114.

Under s 231 of the Companies Act 1965 the petitioner could only apply to appoint a provisional liquidator after the presentation of a valid winding-up petition. Since the petitioner here had prematurely presented the petition, any application for the appointment of a provisional liquidator would similarly be premature. This meant that the order of this court obtained by the petitioner on 22 April 1998 for the appointment of a provisional liquidator was tainted with illegality. It seems that the petitioner presented the petition on the basis that the respondent was indebted to the petitioner for goods sold and delivered but alas the affidavit in encl 4 did not show that there was a prima facie case to wind up the respondent. It was deposed by Kenneth Teh that the receiver and manager have been advised by their solicitors that this court would only exercise its discretion under s 231 of the Companies Act 1965 to appoint a provisional liquidator when there was evidence to show a likelihood of dissipation of the assets of the respondent pending the hearing of the petition. Paragraph 10.1 of the affidavit in encl 4 merely alleged that Voon Hon Kong, the deponent, verily believed that the respondent's assets might be dissapated if a provisional liquidator was not appointed. This averment did not disclose any evidence or ground for such a belief. It was a bald assertion. Nor was any ground disclosed in encl 4 to warrant this court to exercise its discretion under s 231 of the Companies Act 1965 to appoint a provisional liquidator. *Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303 is authority for the proposition that where a deponent averred he was 'advised and verily believed' but did not disclose the source of his information or the person who had advised him, the averment was bad. This was said to be hearsay evidence. Rule 35(1) of the Companies (Winding-Up) Rules 1972 states that at any time after the presentation of a petition, the court may, upon the application of any creditor or contributory of the company and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator, make the appointment upon such terms as the court shall think just or necessary. Clearly, this rule talks of 'sufficient ground' that has to be set out before

a provisional liquidator is appointed but nowhere in encl 4 was there any reference to that sufficient ground. In *Re Qintex Ltd (No 3)* (1990) 2 ACSR 627, the Supreme Court of Tasmania spoke of the 'threshold test' to be applied before a provisional liquidator would be appointed. There the court held that:

(i) Although there are no legislative fetters on the court's discretion to appoint a provisional liquidator under s 372(2) of the Companies (WA) Code following the filing of a winding-up application and prior to the making of a winding-up order, in the proper exercise of its judicial discretion the court must be satisfied, as a 'threshold test', that ultimately the court is likely to make the order sought. This 'threshold test' requires the court to be satisfied that:

(a) the applicant for the winding-up order is a creditor of the company: where a disputed debt is concerned, the court will only fail to be so satisfied where the debt is disputed on some substantial ground;

(b) there is subsisting a valid winding-up application; and

(c) there is adequate evidence adduced to show that a winding-up is, in the absence of material to the contrary, likely.

Re McLennan Holdings Pty Ltd [1983] 7 ACLR 732, followed.

Mann v Goldstein [1968] 1 WLR 1091, considered.

(ii) Once the 'threshold test' is resolved in favour of an applicant, whether the court will make an order appointing a provisional liquidator to a company will depend on the commercial realities and the circumstances of each case: urgency, insolvency and public interest are but some of these (and no one is decisive). The court must also consider the balance of convenience.

Re Club Mediterranean Pty Ltd (1975) 11 SASR 481, applied.

Re Brylyn (No 2) Pty Ltd [1988] 12 ACLR 697, followed.

(iii) Dicta: The admission by a managing director of a company that the company has no money is evidence that the company is unable to pay its debts.

Re Flagstaff Silver Mining Co of Utah (1875) LR 20 Eq 268, considered.

At p 644 of the report, Underwood J had this to say:

I adopt the following passage from *Brylyn (No 2)* at p 707:

'The second point raised by counsel for the respondent has caused the greatest difficulty, namely whether any good purpose exists for the appointment of a provisional liquidator of this trustee company on the ground that there was in fact nothing useful for him to do. The role of a provisional liquidator is traditionally to preserve the status quo until the hearing and determination of the application to wind up. Subject to an order of the court, he may exercise all or any of the powers contained in s 377(a) to (k). See r 61 which also gives him the power to carry on the business the company. He has the power to bring and defend actions and also to sell or otherwise dispose of, in any manner, all or any part of the property of the company.

It is true that a provisional liquidator is not appointed for the asking. There must be good reason such as urgency, or unusual circumstances such as danger to assets, lack of control, deadlock, or

> some public interest element for his appointment and there must be something for him usefully to do. The attempt (sic) will also involve costs which ought not to be thrown away: *Re Mclennan Holdings Pty Ltd* ACLR 741; ACLC 793; *Re Johannisberg Land and Gold Trust Co* [1982] 1 Ch 583, per Chitty J at pp 589–90; *Re Clearwater Pty Ltd* [1981] 6 ACLR 201; *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105.'

It was argued by Mr Wong Kian Kheong, learned counsel for the respondent, that once a receiver and manager has been appointed over a company (in this case, the respondent), there may not be a need in law and in fact for the appointment of a provisional liquidator under s 231 of the Companies Act 1965. He justified this argument by saying that once appointed, the receiver and manager would have taken all reasonable and sufficient measures to prevent any dissipation of assets of the respondent by:

(i) placing a security guard at the business premises; and

(ii) changing all the locks of the business premises.

I pause here to refer to the case of *Re Chateau Hotels Ltd* [1977] 1 NZLR 381 which spoke of the duty of a provisional liquidator. The sole question which Roper J had to face in that case concerned the powers of a provisional liquidator who had been appointed by an order of the court dated 28 November 1975 under s 234(1) of the Companies Act 1955, which order did not limit nor restrict the provisional liquidator's power. The provisional liquidator sought a declaration as to the validity of certain debentures. The debenture holder contended that the provisional liquidator, despite no restriction having been placed on his powers, could only protect the status quo. It was held that the provisional liquidator had no jurisdiction to commence proceedings challenging the validity of a debenture. The court was also of the view that a provisional liquidator's primary duty is to preserve the status quo with the least possible harm to all concerned so as to enable the court to decide after a proper and final hearing whether or not the company should be wound up. In so holding, the court vigorously applied two authorities. One was *Re Dry Docks Corp of London* (1888) 39 Ch D 306 at p 309 and, the other was, *Re Carapark Industries Pty Ltd* [1967] 1 NSWR 337 at p 341. The court also referred to *Levy v Napier* (1962) SC 468 and concluded that liquidators were required to be independent and neutral, particularly so in the case of provisional liquidators.

My research shows this much. Eichelbaum CJ in *Robert Bryce & Co Ltd v Chicken & Food Distributors Ltd* [1991] MCLR 133 considered the principles applicable to an application for the appointment of a provisional liquidator by referring to *Re Jeans West (Distribution) Pty Ltd* (1990) 4 ACSR 470; 9 ACLC 592; 5 WAR 31, a decision of the Supreme Court of Western Australia, delivered on 9 April 1990, and his Lordship noted at p 134 of the report:

> The Master concluded that the requirements which an applicant had to meet were first to show that there was a valid winding-up petition, and likelihood that the petitioner would succeed, and secondly, a need for an

interim control of the company pending a winding-up order. In relation to the second matter, factors regarded as relevant were: (a) whether the company's assets were in jeopardy; (b) whether the status quo should be maintained; and (c) whether the interests of the creditors were safeguarded.

His Lordship Eichelbaum CJ adopted these requirements when considering the application before him. He concluded that the company's assets were at risk. It seemed that the second debenture holder of the company received payment which should have gone to another creditor or creditors, and, to justify retention of that payment, reliance was made on a security which may have been open to challenge. There was also no evidence that the company was attempting to collect its debts. Furthermore, improper preferences were given to creditors. For these reasons, Eichelbaum CJ ordered the appointment of a provisional liquidator. On the facts, the case of *Robert Bryce & Co Ltd v Chicken & Food Distributors Ltd* were poles apart from the present case. Here, it was a simple case of the receiver and manager challenging the appointment of a provisional liquidator obtained by the petitioner by way of an ex parte application in encl 5 for non-compliance of s 218(2)(a) of the Companies Act 1965.

Most debenture trust deeds contain provisions conferring the right to appoint a receiver and a manager of the company's property with wide powers of managing the business of the company as its agent and of taking possession and realizing its assets for the benefit of the debenture-holders. This was what happened in the present case. As I said earlier in this judgment the material terms of the debentures were, inter alia, that all monies, interest and costs payable from time to time to BBMB would be secured, one way or the other, by fixed and floating charges over all the assets of the respondent. It has been said that the effect of liquidation, whether compulsory or voluntary, is simply to revoke the authority of the receiver and manager to carry on the business as agent of the company and with it his power to bind the company effectively (*Gosling v Gaskell and Grocott* [1897] AC 575; *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354 at p 382; and *Sowman & Ors v David Samuel Trust Ltd (in liquidation)* [1978] 1 WLR 22) and to pledge the company (*Mercantile Credits Ltd v Atkins* [1985] 3 ACLC 485 which was later affirmed on appeal and reported in [1986] 4 ACLC 125). A striking example can be found in *Thomas v Todd* [1926] 2 KB 511 where the company passed a resolution for voluntary winding up on 27 October, and on 1 November the receiver for debenture-holders, who was managing the company business, entered into a contract to employ the plaintiff. The court held that the contract had been made with the defendant personally and not with the company, whose agent the defendant ceased to be when the resolution for winding-up was passed. It must not be forgotten that the principle of law distilled from this case would deprive the receiver of the power, which he is usually given, of taking proceedings in the name of the company. It is comforting to note that the court in *Gough's Garages Ltd v Pugsley* [1930] 1 KB 615 rightly held that the right to take proceedings in the name of the company to preserve its assets was part of the debenture-holders' security which was not terminated by winding up. It is also

comforting to note and emphasise that *Sowman v David Samuel Trust Ltd* and *Re High Crest Motors Pty Ltd* [1978] 3 ACLR 564 gave life to the receiver. These two cases held that although winding-up terminates any authority of the receiver to act as agent of the company, it does not affect the receiver's power to hold and dispose of property of the company that is subject to the security in favour of the debenture-holders or other mortgagee. In other words, the property of the company charged to the debenture-holder, including (if charged) its undertaking, remains solely in the control of the receiver, who will continue to manage and deal with the property as a principal (*Gosling v Gaskell*). In my judgment, a receiver and a manager is entitled in law to not only possession of all the physical assets of the company but also entitled to all choses in action, such as the benefit of contracts with the company existing at the date of the winding-up (*Gough's Garages Ltd v Pugsley*). I venture to say that if circumstances demand, the receiver and manager may enforce these rights by suing in the name of the company.

Reverting back to the mainstream of the case, it is interesting to note that at para 6 of the affidavit in encl 4, it alluded to a bank stationing its security guard at the respondent's factory. This raised the inference that the petitioner knew as a matter of fact that there was at least a bank which had an interest in the assets of the respondent. There was, sad to say, no full and frank disclosure by the petitioner in their ex parte application in encl 5 of the following relevant facts:

(i) which bank was interested in the assets of the respondent so as to station a security guard at the respondent's factory;

(ii) whether such a bank has any security interest in the assets of the respondent which gave priority to such a bank;

(iii) whether such a bank has taken any step to enforce its security interest in the assets of the respondent; and,

(iv) whether such a bank has appointed a receiver and manager to conduct the affairs of the respondent.

In my judgment, the failure of the petitioner to make a full and frank disclosure of all relevant facts in their ex parte summons-in-chambers application in encl 5 would empower this court, without hesitation, to set aside the order of this court dated 22 April 1998. The Supreme Court of Queensland had occasion to consider non-disclosure in the appointment of a provisional liquidator in *South Downs Packers Pty Ltd v Beaver* [1984] 8 ACLR 990. I need only to refer to the headnote which summarises the case lucidly:

> On 3 April 1984, the respondent presented a petition for the winding up of the company on the just and equitable ground. On the same day, the respondent applied ex parte for the appointment of a provisional liquidator and an order in that behalf was made that day by a Master. The substantial ground of the application was the likelihood that the affairs of the company would be conducted for the benefit of the Hart interests to the detriment of the Beaver interests and that substantial shareholders' funds might be lost.

It was said that the respondent obtained the order for the appointment of the provisional liquidator by material non-disclosure and on 26 April 1984 a summons was issued by way of appeal to the chamber judge against the Master's order; and on the same day a notice of motion for similar relief was given and also to set aside the order. On 10 May 1984, Matthews J refused the application.

On appeal to the Full Court: Held: Per Connolly J, with whose reasons Campbell CJ agreed. McPherson J dissenting, the appeal should be dismissed.

Per Campbell CJ, the question was whether the several allegations of non-disclosure in the present case, read in the context of the other material before the Master, were such as to lead to the conclusion that his Honour erred in not holding that the Master was thereby led or induced to appoint a provisional liquidator in the circumstances. Or, to put it in another way, did his Honour err in not finding that such non-disclosed facts were important to the Master in the formation of the latter's conclusion that the case was one for the appointment of a provisional liquidator?

Per Connolly J, with whose reasons Campbell CJ agreed, the undisputed circumstances of the case warranted the appointment of a provisional liquidator. Not one of the allegations of non-disclosure touched or qualified in the slightest the essential facts. All were carefully considered by Matthews J who concluded that there had been no material non-disclosure.

It was unnecessary to express a firm option on the proposition advanced by the appellants (and for which indeed there is support in the books) namely, that where an ex parte order has been obtained by material non-disclosure, it must be discharged, even if the non-disclosure resulted from ignorance of the materiality of the fact or forgetfulness.

But, semble, when it is remembered that, upon the discharge of the order, a fresh application may immediately be made upon the merits the rule as stated seems to be somewhat inflexible and not to accord with modern views on the exercise of the judicial discretion.

Next, an argument was advanced that the petitioner did not give any security or any undertaking to this court to pay damages if no winding up order was made against the respondent. Such failure would, so the submission went, be a sufficient ground to set aside the ex parte order dated 2 April 1998. Sir Robert Megarry VC in the case of *Re Highfield Commodities Ltd* [1985] 1 WLR 149 had this to say at p 155 of the report which must surely apply to the factual matrix of the present case:

> ... First, the general practice is to require an undertaking in damages if a provisional liquidator is appointed ex parte. Second, the general practice is not to require an undertaking in damages if the appointment is made inter partes. The distinction, I think, or a distinction, must be that the protection of the undertaking will be given where the company has had no opportunity of providing any answer or explanation to contentions which may prove to be wholly unfounded, whereas if the company has at least had the opportunity of being heard, the court will be making the appointment after considering what the company has said, if it has chosen to speak, and so can better assess the propriety of making the appointment.

It is a correct statement of the law to say and I so say that on an ex parte application, the applicant will be required to undertake and give an

undertaking that if no order is made, he will compensate the company for any damages that may flow from the appointment. It was therefore not a surprise that in *PacAsian Services Pte Ltd v European Asian Bank AG* [1989] 3 MLJ 385, the order contained the usual undertaking that the applicant would 'abide by any order the court or a judge may make as to damages in case the court or a judge shall hereafter be of opinion that the above-named company shall have sustained any by reason of this order which the petitioner ought to pay'. Of course where the applicant is the crown, an undertaking as to damages is certainly not required: *Re Highfield Commodities Ltd.*

The present case appears to be on all fours with *Re AH Hodge & Sons Ltd* which was an appeal against an order by the deputy registrar in appointing provisional liquidators. There a receiver and manager of the company's assets had been appointed and he was in control and having possession of those assets. A winding-up petition was later presented and the provisional liquidators were appointed. The appeal by a rehearing of the application was heard on material which was not before the deputy registrar. This critical question was whether a need had been demonstrated to protect the assets of the company. In allowing the appeal, the court held that to direct the provisional liquidators to take possession of all the real and personal estate of the company would have been to ignore the principle that the receiver's entitlement to custody and control was superior to a liquidator's statutory right and duty to take the company's property into his custody and control. The court also held that the receiver's entitlement was superior to that of a liquidator and, consequently, the court held further that the need to protect the company's assets by the appointment of a provisional liquidator had not been shown. In my judgment, the same is also true in the present case. Thus far the receiver and manager has done a good job. There was no allegation in encl 4 of the lackadaisical attitude of the receiver and manager. Neither was there evidence that the receiver and manager had dissipated the assets. This judgment is another striking example where the court would be obliged to remove the provisional liquidator that was appointed pursuant to encl 5. This was my judgment and I so hold accordingly.

In the midst of hearing encl 10, Mr Ong Ban Chai sprang a surprise by raising a preliminary objection which was not extended to Mr Wong Kian Kheong before hand. The latter was obviously displeased and expressed his displeasure. I share the sentiments of Mr Wong Kian Kheong and wish to state that preliminary objections must be advanced for the purpose of advancing and promulgating a point of law and not on account of a desire to delay the trial. The preliminary objection was that the papers were not served on the Official Receiver. But here an approved liquidator in the person of Mr Teoh Cheng Huat of M/s CH Teoh & Co was appointed provisionally and not the Official Receiver (see encl 5) and, consequently, there was no necessity to serve the papers on the Official Receiver. At any rate, there was an undertaking by Mr Wong Kian Kheong to inform the Official Receiver as to the outcome of encl 10. I rejected outright that preliminary objection as being frivolous and vexatious and

solely designed to delay the hearing of encl 10. That preliminary objection was rejected without any order as to costs. For the reasons adumbrated above, I made orders in terms of encl 10, particularly paras 2(a), 2(b), 2(c) and 2(d). As far as para 2(d) of encl 10 was concerned, I made an order that an enquiry be conducted by the senior assistant registrar on 20 July 1998. I too made an order that Mr Wong Kian Kheong was to inform the Official Receiver by letter as to the outcome of encl 10 paras 2(a), 2(b), 2(c) and 2(d) thereof with a copy to the court. This supplementary order rested on para 2(e) of encl 10. It is germane to mention that on 4 May 1998, I granted an order in regard to encl 10, para 3(a) because the parties had consented to it.

Order accordingly.

Reported by Loo Lai Mee